Aozora Bank, LTD. v Barclays Bank PLC
2015 NY Slip Op 31108(U)
June 24, 2015
Supreme Court, New York County
Docket Number: 651510/2013
Judge: Lawrence K. Marks
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

----------X

AOZORA BANK, LTD.,

Plaintiff,

Index No. 651510/2013

-against-

BARCLAYS BANK PLC; BARCLAYS CAPITAL, INC.; 250 CAPITAL LLC; MERRILL LYNCH & CO., INC.; MERRILL LYNCH BANK USA; and DEERFIELD CAPITAL MANAGEMENT LLC,

Defendants.

----------X

LAWRENCE MARKS, J.

In this action, plaintiff Aozora Bank, Ltd. (Aozora) seeks damages arising from the loss of its $123 million investment in five collateralized debt obligations (CDOs), as follows: $4 million invested in Buckingham CDO III (Buckingham III); $10 million invested in Citius I Funding (Citius I); $69 million invested in Citius II Funding (Citius II); $30 million invested in ARLO VII Limited Series 2006-15 (SABS CDO 2006-2) (ARLO VII); and $10 million invested in Liberty Harbour II CDO (LH II) (together, Barclays CDOs). Complaint, ¶¶ 2, 3, 6-7. The six-count complaint asserts causes of action for fraud, aiding and abetting fraud, breach of the implied covenant of good faith and fair dealing, tortious interference with contract, negligent misrepresentation and unjust enrichment.

Defendants move to dismiss the complaint as time-barred, based upon documentary evidence, and for failure to state a cause of action. Barclays Bank PLC and Barclays Capital, Inc. (together, Barclays) and 250 Capital LLC (250 Capital) also seek dismissal based upon Aozora's failure to plead with sufficient particularity under CPLR 3013 and 3016(b). Motion sequence

numbers 001, 002 and 003 are consolidated for disposition.[1]

BACKGROUND

Plaintiff Aozora is a Japanese bank, with its principal offices located in Tokyo, Japan. Complaint, ¶ 13. Defendant Barclays Bank PLC allegedly controls defendant Barclays Capital, Inc., and these entities arranged, structured, underwrote, marketed and sold the Barclays CDOs. *Id.*, ¶¶ 16-17, 19. Defendant 250 Capital served as collateral manager for LH II. *Id.*, ¶ 25. Defendant Merrill Lynch Bank USA (MLBUSA) allegedly served as the "Initial Liquidity Bank in connection with LH II, in which capacity it purportedly provided asset-backed commercial paper ('ABCP') liquidity facilities relating to LH II's issuance of ABCP." *Id.*, ¶ 27. 250 Capital and MLBUSA are allegedly wholly owned by defendant Merrill Lynch & Co., Inc. *Id.*, ¶¶ 24-28. Defendant Deerfield was the collateral manager for Buckingham III, *id.*, ¶ 23, and nonparty Aladdin Capital Management LLC (Aladdin) served as collateral manager for Citius I and II. *Id.*, ¶ 31.

Aozora claims that defendants perpetrated three distinct frauds, inducing its $123 million investment in the Barclays CDOs. The first alleged fraud involved Citius I and II and Buckingham III, which Aozora refers to as the "Barclays Managed CDOs." *Id.*, ¶ 3. These CDOs were allegedly part of Barclays' "undisclosed scheme" of "self-dealing," whereby

---

[1] By stipulations dated March 19, 2015, Aozora voluntarily discontinued this action as against Deerfield Capital Management LLC (Deerfield) with prejudice, and partially discontinued the action against Barclays to the extent based upon claims concerning Buckingham III, the CDO allegedly managed by Deerfield. NYSCEF document numbers 215 and 216. Deerfield had also moved to dismiss (in motion sequence number 004), but that motion is now moot as a result of the discontinuance and not presently before the court.

Barclays "forc[ed] the CDOs to purchase specialized, 'bespoke' CDOs also created by Barclays," allowing "Barclays to multiply the profits normally enjoyed from CDO creation, but at the cost of *degrading* the Barclays-arranged CDOs that purchased them, saddling such CDOs – and their investors, including plaintiff – with substantial losses." *Id.* (emphasis in original). Barclays allegedly misrepresented in the CDOs' marketing materials that the independent collateral managers had selected "optimal" collateral portfolios, and that the interests of the collateral selectors were aligned with the interests of the Barclays Managed CDO investors such as Aozora. *Id.*, ¶ 4.

The second alleged fraud involved Aozora's investment in ARLO VII, a "bespoke CDO" that Barclays sold "directly to an investor (rather than to captive purchasers such as the Barclays Managed CDOs)." *Id.*, ¶ 6. Barclays allegedly obtained an "inflated" rating for ARLO VII by "'gaming' the credit ratings process by seeking a ratings [sic] only from Moody's as it knew that a ratings from Standard & Poor's ('S&P') would be lower." *Id.* Barclays also allegedly "manipulat[ed] the selection and contents of the underlying portfolio to take advantage of rating agency model loopholes," and included an "obscur[e] and complex[]" amortization feature. *Id.*

The third alleged fraud involved LH II. Similar to the Barclays Managed CDOs, defendants allegedly misrepresented the "identity of the collateral selector, and the methods and motives employed to select such collateral." *Id.*, ¶ 7. LH II allegedly did not feature any of the Barclays "bespokes," but rather, it "was secretly conceived and operated as a 'balance sheet' CDO for the benefit of Defendant MLBUSA." *Id.* Aozora claims that, "[u]nbeknownst to LH II's investors, LH II's collateral portfolio would consist of assets that MLBUSA wished to disown." *Id.*

Aozora claims that it "scrutinized" the underlying "collateral and collateral portfolio for each of the CDOs at issue," the "structure and structural protections against collateral losses for each of the CDOs," and the "reputation, skills and experience of the ostensible collateral managers for Buckingham III, Citius, I, Citius II, and LH II." *Id.*, ¶ 308. Aozora allegedly "review[ed] the offering and marketing materials drafted and disseminated by Defendants, including, *inter alia*, offering circulars, indentures, pitchbooks and termsheets, as well as asset-level information respecting the collateral portfolio," and "conducted an independent analysis that confirmed that the investment – as represented by Defendants – was appropriate." *Id.*, ¶ 309. Aozora maintains that it neither knew nor could have known that the CDOs were not as represented in the marketing materials, and that behind the scenes, Barclays and MLBUSA had seized control of the CDOs' portfolio selection from the collateral managers, allowing Barclays and MLBUSA to disown their own unwanted assets and serve their own trading and hedging strategies. *Id.*, ¶ 310. Aozora allegedly suffered "100% principal losses" on the Barclays CDOs. *Id.*, ¶ 316.

DISCUSSION

Barclays argues that all of Aozora's claims are time-barred under New York law. 250 Capital, and defendants Merrill Lynch & Co., Inc. and MLBUSA (together, Merrill Lynch), join in this portion of Barclay's motion. 250 Capital opening brief at 1, 20-21; Merrill Lynch opening brief at 1. Aozora counters that its claims are timely.

"Where a nonresident brings a cause of action that accrued outside of New York, CPLR 202 applies, and the action must be timely in both New York and the other jurisdiction." *Oxbow*

Calcining USA Inc. v. American Indus. Partners, 96 A.D.3d 646, 651 (1st Dep't 2012), citing *Global Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 528 (1999). "When an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss." *Global Fin. Corp.*, 93 N.Y.2d at 529. A corporate plaintiff resides in its "state of incorporation or its principal place of business." *Oxbow Calcining USA Inc.*, 96 A.D.3d at 651. Here, Aozora is a Japanese bank, with its principal offices located in Tokyo, Complaint, ¶ 13, and, therefore, its claims must be timely under the laws of both New York and Japan:

> On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable.

Baptiste v. Harding-Marin, 88 A.D.3d 752, 753 (2d Dep't 2011). On the instant motions, defendants argue that Aozora's claims are time-barred under New York law only, reserving their right to later demonstrate that Aozora's claims are also untimely under Japanese law.

A. Fraud and Aiding and Abetting Fraud (first and second causes of action)

Defendants argue that Aozora's fraud claims are time-barred under the six-year statute of limitations and the two-year discovery accrual rule. Aozora does not dispute that it commenced this action more than six years after investing in the Barclays CDOs. Instead, Aozora counters that the discovery accrual rule applies to its fraud-based claims, because it "did not suspect that the Barclays CDOs were the product of fraud until counsel conducted a forensic analysis of its CDOs in late 2012." Aozora opp brief at 4. Aozora claims that it began to investigate its CDO

portfolio after it was "contacted by a former employee [in September 2012] on behalf of an Australian law firm who, in light of successful litigations involving CDOs *other than* the Barclays CDOs, inquired as to whether Aozora wanted its portfolio analyzed." *Id.* at 4 n. 4 (emphasis in original).

Aozora's first cause of action alleges that it was fraudulently induced to invest in the Barclays CDOs. The second cause of action alleges that defendants aided and abetted the fraud. Under CPLR 213(8), both of these fraud-based claims must be commenced within "six years from the date the cause of action accrued or two years from the time the plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it." The fraud claims accrued when the defendants "completed the act that the alleged fraudulent statements had induced." *Prichard v. 164 Ludlow Corp.*, 49 A.D.3d 408, 408 (1st Dep't 2008) (fraud claim accrued when "[p]laintiffs entered into the contract to purchase shares in the corporation").

According to the complaint, Citius I closed on May 3, 2006, Buckingham III closed on August 9, 2006, Citius II closed on November 10, 2006 and LH II closed on February 27, 2007. Complaint at 14-15. Barclays submits a "Trade Confirmation" showing a "Settle Date" of February 26, 2007 for ARLO VII. Gerber affirmation, exhibit 17. Aozora commenced this action by filing the summons with notice on April 26, 2013, more than six years after the closings and Aozora's investments in the Barclays CDOs. Therefore, Aozora's fraud claim is time-barred unless Azora "did not discover or, with reasonable diligence, could not have discovered" the alleged fraud before April 26, 2011. *Gutkin v. Siegal*, 85 A.D.3d 687, 687 (1st Dep't 2011):

> The test as to when fraud should with reasonable diligence have been discovered is an objective one. Where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him.

Id. at 688 (internal quotation marks and citations omitted). In *Gutkin*, the court held that the "plaintiff had constructive knowledge of the alleged fraud . . . when he recognized that his investment returns were significantly less than expected. At that point, a reasonable investor who had lost millions of dollars would have investigated further, rather than accept the cursory explanation plaintiff allegedly received." *Id.*

"The burden of establishing that the fraud could not have been discovered during the two-year period before the commencement of the action rests on the plaintiffs, who seek the benefit of the discovery exception to the six-year statute of limitations." *Siler v. Lutheran Social Servs. of Metro. N.Y.*, 10 A.D.3d 646, 648 (2d Dep't 2004); *see also Riverbay Corp. v. Thyssenkrupp N. El. Corp.*, 116 A.D.3d 487, 488-489 (1st Dep't 2014) (the plaintiff is required "to allege any facts to explain why it could not, with reasonable diligence, have discovered the alleged fraud"); *Endervelt v. Slade*, 214 A.D.2d 456, 457 (1st Dep't 1995) (it is "plaintiff's burden of proof on the Statute of Limitations issue as to when the purported fraud was discovered").

Here, the complaint alleges that Aozora's investments in the Barclays CDOs were rated as follows: Buckingham III's "D" tranche was rated "A"; Citius I's "Equity" tranche was "Unrated"; Citius II's "B," "C" and "D" tranches were rated "AA," "A" and "BBB," respectively; LH II's "A-2" tranche was rated "AAA"; and ARLO VII's investment was rated

"AA-" and its tranche was identified as "n/a." Complaint, ¶ 14. Although not clear from the face of the complaint, the alleged ratings appear to be based upon the rating system of Standard & Poor's (S&P), as opposed to the rating system of Moody's Investor Service (Moody's), though the complaint and supporting documents refer to both rating systems. *Compare* Complaint, ¶ 14 *with* ¶¶ 141-143, 152, 156, 161-162, 166, 199-203 *and* Gerber affirmation, exhibits 57 and 58 at 84, exhibit 60 at 83. These ratings are consistent with the anticipated ratings identified in the Barclays CDOs' offering circulars, termsheets and prospectus, the marketing materials allegedly relied upon by Aozora in making its investments in the Barclays CDOs. Complaint, ¶¶ 72-76, 142; Gerber affirmation, exhibit 5 at 2 (prospectus stating that "[i]t is expected that the [ARLO VII] Notes will be rated 'Aa3' by Moody's"); exhibit 45 at 1 ("Expected Rating" for ARLO VII was "Aa3"); exhibit 57 at 84 (Citius II's offering circular stated that it was "a condition to the issuance of the Offered Securities" that the class B, C and D notes "be rated no lower than" Aa2, A2, and Baa2 by Moody's, respectively, and AA, A and BBB by S&P, respectively); exhibit 58 at 84 (Buckingham III's offering circular required its class D notes to "be rated no lower than 'A2' by Moody's and no lower than 'A' by [S&P]"); exhibit 60 at 83 (LH II's offering circular required that its "Class A-2 Notes be rated no lower than 'Aaa' by Moody's and no lower than 'AAA' by [S&P]").

In August and November 2007, Moody's announced that it was placing the notes issued by the Barclays CDOs "on review for possible downgrade," as a result of "deterioration in the credit quality of the transaction's underlying collateral pool, which consists primarily of structured finance securities" and, in the case of Citius I, "primarily of residential mortgage-backed securities." Gerber affirmation, exhibits 21, 22, 23, 24, 25, 29. Moody's subsequently

announced that it had downgraded the Barclays CDOs and placed them on review for further downgrades. Specifically, in January 2008, Moody's downgraded Citius II's Class B notes to Ba3, Class C notes to Caa2 and Class D notes to Ca. *Id.*, exhibit 20. In April 2008, Moody's downgraded ARLO VII's rating to B1, LH II's Class A-2 notes to B1 and Buckingham III's Class D notes to C. *Id.*, exhibits 26, 27, 28. Moody's announcements confirmed that these ratings downgrades resulted from "deterioration in the credit quality of the transaction's underlying collateral pool, which consists primarily of structured finance securities," and reflected "increased deterioration in the credit quality of the underlying portfolio." *Id.*, exhibits 20, 26, 27, 28.

In interpreting investment ratings in another fraud-based lawsuit brought by Aozora, the court acknowledged that S&P and Moody's ratings of "AAA" and "Aaa" reflect "the high quality and low risk of the investment," while downgrades to "CCC+" and "Caa2" render the investment as "judged to be speculative of poor standing and . . . subject to very high credit risk." *Aozora Bank, Ltd. v. Credit Suisse Group*, 2015 WL 1815683, *18 (Sup Ct, NY County 2015). Thus, within less than two years of their securitizations, the Barclays CDOs' ratings and downgrades ranged "from Moody's highest rating of Aaa, reserved for obligations 'judged to be of the highest quality, subject to the lowest level of credit risk,' to [ratings] of C, reserved for 'the lowest rating' obligations that 'are typically in default, with little prospect for recovery of principal or interest.'" *Id.* at *3 (quoting Moody's explanation of "Rating Symbols and Definitions").

Moreover, on April 23, 2008, in the midst of the ratings downgrades, Aozora announced a "revised . . . earnings forecast for the full fiscal year ending March 31, 2008 ('FY2007')." *Id.*, exhibit 40. In this announcement, Aozora stated that it had "recorded unrealized valuation losses

of 45.3 billion yen on its previously disclosed portfolio of [CDOs]," and that, as of March 31, 2008, "asset-backed CDOs were valued at 4.4 billion yen, representing 9.5% of their original value." *Id.* (stating that "non-interest income declined sharply in the turbulent market conditions resulting from the U.S. sub-prime loan problem"); *see also id.*, exhibit 18 (same, reported in May 15, 2008 news release).

LH II and Citius II each sent notices of "Event[s] of Default" in May and November 2008, respectively. Gerber affirmation, exhibits 36 and 37. LH II's notice was based upon a default of accrued interest payments, and Citius II's notice was based upon the failure to make payment on certain notes. *Id.* Citius II and LH II were liquidated in January and August 2009, respectively. *Id.*, exhibits 38 and 39.

In addition, defendants cite to instances where investors commenced litigation against Barclays and Merrill Lynch, in 2008 and 2009, based upon allegations that – like the allegations in the instant action – the defendants used the investment vehicles to "off-load" their "toxic" assets at the expense of investors, using those investments as "a dumping ground" for assets that these entities sought to remove from their books. *See Oddo Asset Mgt. v. Barclays Bank PLC*, Sup Ct, NY County, index No. 109547/2008, NYSCEF document number 2, ¶¶ 8-15 (action commenced against Barclays in November 2008); *Coöperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v. Merrill Lynch & Co.*, Sup Ct, NY County, index No. 601832/2009, NYSCEF document number 2, ¶¶ 3-5 (action commenced against Merrill Lynch & Co. in August 2009). Defendants submit evidence of other lawsuits and publications that identified the potential for fraud in the collateral selection process. For example, on December 28, 2007, *The Wall Street Journal* published an article titled "Deals & Deal Makers: How 'Norma' begat crisis

– Merrill-drawn CDO concentrated the risk of mortgage default." Gerber affirmation, exhibit 46. On December 23, 2009, *The New York Times* published an article titled "Banks Bundled Bad Debt, Bet Against It and Won." *Id.*, exhibit 47. On February 3, 2010, *The Financial Times* published an article, stating that, "[i]n December, the SEC sent subpoenas to banks," including Merrill Lynch and Barclays, "seeking information about the sale and marketing of . . . CDOs" and "examining whether the banks took negative positions on these securities at the same time they marketed them to investors." *Id.*, exhibit 49. On April 16, 2010, *The New York Times* published an article titled "S.E.C. Accuses Goldman of Fraud in Housing Deal," which examined government claims that Goldman Sachs "created and sold a mortgage investment that was secretly intended to fail." *Id.*, exhibit 50. Defendants also cite to "The Financial Crisis Inquiry Report" published by the United States Financial Crisis Inquiry Commission in January 2011, which concluded that "[t]he high ratings erroneously given CDOs by credit rating agencies encouraged investors and financial institutions to purchase them," and that "[t]here was a clear failure of corporate governance at Moody's, which did not ensure the quality of its ratings on tens of thousands of mortgage-backed securities and CDOs." Financial Crisis Inquiry Report at 155.

This evidence makes clear that Aozora knew its investment in the Barclays CDOs had largely failed by 2009, that a public record of the facts underlying Aozora's fraud claims was developed as early as April 2008, and grew significantly through 2009, 2010, and January 2011, and that other investors were capable of discovering fraud claims against Barclays and Merrill Lynch prior to April 2011. Accordingly, Aozora was on inquiry notice prior to April 26, 2011, more than two years before it commenced this action. *CIFG Assur. N. Am., Inc. v. Credit Suisse Sec. (USA) LLC*, Sup Ct, NY County, July 14, 2014, Oing, J., index No. 653974/2013, *6, 9-11,

44-45, *aff'd* – A.D.3d –, 2015 NY Slip Op 04558 (1st Dep't 2015) (dismissing fraud claims as time-barred where plaintiff was put on notice of defendant's fraud more than two years before the action was commenced, based upon ratings downgrades, events of default, "other lawsuits" and "certain reports, made public, indicating the alleged actions that form the basis of plaintiff's claims"); *Gutkin*, 85 A.D.3d at 688 ("plaintiff had constructive knowledge of the alleged fraud in 2005, when he recognized that his investment returns were significantly less than expected"); *see also Aldrich v. Marsh & McLennan Cos., Inc.*, 52 AD3d 435, 436 (1st Dep't 2008) (conclusion that plaintiffs were on "inquiry notice" was "supported by the extensive information that was available to plaintiffs in the public domain"); *Shapiro v. Hersch*, 182 A.D.2d 403, 404 (1st Dep't 1992) ("the underlying facts of the fraud were well publicized in 1985 and 1986, and, with due diligence, could have been discovered by the plaintiff at that time").

In support of its argument that Aozora did not suspect the alleged fraud until its attorneys "conducted a forensic analysis of its CDOs in late 2012," Aozora opp brief at 4, Aozora submits the affidavit of Justin Hirsch (Hirsch), a general manager of Aozora's international division, who works in Aozora's headquarters in Tokyo. Hirsch aff, ¶ 1. Hirsch manages Aozora's "non-Japanese distressed loan portfolio including [its] portfolio of [CDOs]." *Id.* Hirsch states that, "in late 2008, [Aozora] conducted an internal investigation into the causes of its CDO investment losses," and "subsequent audits concerning its investment losses." *Id.*, ¶ 6. According to Hirsch:

> These internal investigations and audits were conducted with oversight by, among others, [Aozora] executives, investment personnel, risk management and compliance personnel, as well as audit personnel. As noted in [Aozora's] public filings, [it] determined that its CDO impairment, based on the information available at the time, was the result of the U.S. financial crisis. . . . [Aozora] did not uncover any evidence at that time to suspect that

> the arrangers were responsible for [its] CDO losses.

Id. Hirsch claims that, in September 2012, Aozora was contacted by a former employee on behalf of an Australian litigation boutique who, based upon claims brought by other banks against structured finance arrangers, offered to review Aozora's portfolio to determine whether it had viable claims. *Id.*, ¶ 7. Aozora claims that, "[a]fter learning about the possibility of litigation at that time, as part of its due diligence efforts in November and December 2012, [Aozora] spoke with several U.S.-based law firms that had expertise in analyzing structured finance products for evidence of misconduct and litigating those cases." *Id.*, ¶ 8. In March 2013, Aozora retained its current attorneys, Kirby McInerney LLP, to represent it in the instant litigation. *Id.* Hirsch maintains that, after Kirby McInerney LLP reviewed Aozora's "portfolio of CDO investments," Aozora "realized that it might have claims against Defendants, and [Kirby McInerney LLP] on behalf of [Aozora] subsequently filed the instant action against Defendants." *Id.*, ¶ 9.

As a preliminary matter, Hirsch fails to provide any detail concerning the 2008 investigation and subsequent audits, such as who conducted them, how they were performed, what information they uncovered or what materials were analyzed. Significantly, Hirsch fails to explain how the investigation and audits differed from the "forensic analysis" performed by Aozora's attorneys, or why the forensic analysis could not have been performed several years earlier. Aozora opp brief at 4; Hirsch aff, ¶ 9. Moreover, Hirsch's affidavit purports to be based upon personal knowledge, but he concedes that he was not employed by Aozora until 2012, long after the alleged fraud that underlies this action, and several years after the investigation and audit referenced in his affidavit.

In any event, Aozora submitted nearly identical affidavits from Hirsch in three separate actions before Justice Oing and Justice Ramos, making essentially the same argument it makes here in connection with Aozora's fraud claim. Justice Oing rejected the portion of Hirsch's affidavit suggesting that a plaintiff bank can "sit[] back and wait[] until a law firm contacts them" in order to put the bank on inquiry notice. *Aozora Bank, Ltd. v. Deutsche Bank Sec. Inc.*, Sup Ct, NY County, Jan. 14, 2015, Oing, J., index No. 652161/13, NYSCEF document number 168 at 56, 63-65. He reasoned that, if this were the legal standard, the plaintiff "would always satisfy the statute [of limitations]." *Id.*; *see also Aozora Bank, Ltd.*, 2015 WL 1815683 at *5 (same). Based upon the same reasoning, this court rejects the identical theory raised in the Hirsch affidavit on the instant motions. *Aozora Bank, Ltd.*, Sup Ct, NY County, Jan. 14, 2015, Oing, J., index No. 652161/13, NYSCEF document number 168 at 70-76; *Aozora Bank, Ltd.*, 2015 WL 1815683 at *5; *see also Gutkin*, 85 A.D.3d at 688 (plaintiff may not "shut[] his eyes to the facts which call for investigation"). For these reasons, Hirsch's affidavit fails to raise an issue as to whether Aozora, "with reasonable diligence," could have discovered the alleged fraud. *Gutkin*, 85 A.D.3d at 688.

Aozora also submits the affidavit of Masaki Onuma (Onuma), another general manager of Aozora's international division who works at Aozora's headquarters in Tokyo. Both Onuma and Hirsch state in their affidavits that no one staffed in Aozora's New York office was responsible for "monitoring litigation or news concerning the Bank's structured product investments." Onuma aff, ¶ 3; Hirsch aff, ¶ 5. As a preliminary matter, "it is curious that a transnational financial institution as large and sophisticated as" Aozora would "overlook[] years of business publications regularly and explicitly covering matters directly pertinent to [its] investments." *See*

Woori Bank v. Merrill Lynch, 923 F.Supp.2d 491, 496 n 3 (S.D.N.Y.), *aff'd* 542 Fed Appx 81 (2d Cir. 2013). Moreover, neither affidavit actually states that Aozora was unaware of the above-referenced litigation and publications, and Onuma concedes that part of his job function was "information gathering on issues as directed by Headquarters." Onuma aff, ¶ 2. In any event, the standard at issue is whether Aozora, with reasonable diligence, could have discovered the alleged fraud, notwithstanding its employees' assertions that they were not tasked to do so. *See, e.g., Mienik v. Mienik*, 91 A.D.2d 604, 605 (2d Dep't 1982) ("[u]nlike the proverbial ostrich, the plaintiff was not free to remain with his head in the sand. He had a duty to inquire in order to discover the fraud within a reasonable time"). Neither Onuma's nor Hirsch's affidavits raise an issue as to whether a diligent inquiry would have revealed the alleged fraud.

For the foregoing reasons, Aozora fails "to allege any facts to explain why it could not, with reasonable diligence, have discovered the alleged fraud." *Riverbay Corp.*, 116 A.D.3d at 488-489. Accordingly, Aozora's causes of action for fraud and aiding and abetting fraud are time-barred under New York law.

B. Implied Covenant of Good Faith and Fair Dealing (third cause of action)

The cause of action for breach of the implied covenant of good faith and fair dealing is governed by a six-year statute of limitations. CPLR 213(2); *Liberman v. Worden*, 268 A.D.2d 337, 339 (1st Dep't 2000). The claim accrues at the time of the breach. *Robb v. Low*, 99 A.D.3d 614, 614 (1st Dep't 2012).

Aozora's claim for breach of the implied covenant of good faith and fair dealing is based upon its allegation that defendants failed to "provide [Aozora] with the CDOs described in Defendants' Offering and Transactional Documents." Complaint, ¶ 341. This alleged breach

took place when the securitizations closed and Aozora purchased the Barclays CDOs, between May 2006 and February 2007, more than six years before the commencement of this action. *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 112 A.D.3d 522, 523 (1st Dep't 2013) ("claims accrued on the closing date of the MLPA . . . , when any breach of the representations and warranties contained therein occurred"), *aff'd* – N.Y.3d –, 2015 NY Slip Op 04873 (2015). Aozora argues that Barclays continued to use the Barclays CDOs to further its long-term shorting strategy and interfere with the CDO managers' ongoing management obligations, thereby restarting the statute of limitations. Aozora opp brief at 9. Here, however, all of Aozora's allegations relate to defendants "actively soliciting" Aozora's purchase of the Barclays CDOs, while filling those investments with substandard, risky assets that defendants sought to disown, rather than the with the CDOs described in the offering and transactional documents. Complaint, ¶¶ 341-346. All of this conduct took place, at the latest, at the time of securitization and purchase by Aozora. As this action was commenced more than six years later, on April 26, 2013, the third cause of action is time-barred under New York law.

C. Tortious Interference with Contract (fourth cause of action)

The statute of limitations for tortious interference with contract is three years, and it accrues when the plaintiff suffers an injury. CPLR 214(4); *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 92 (1993).

This cause of action, asserted against Barclays and MLBUSA only, is based upon these defendants' tortious interference with "Collateral Management Agreements" (CMAs) entered into between the Barclays CDOs and their collateral managers. Complaint, ¶¶ 350-356. These CMAs included: the CMA between LH II and its collateral manager, 250 Capital; the CMAs

between Citius I and II and their collateral manager, Aladdin; and the CMA between Buckingham III and its collateral manager, Deerfield. Complaint, ¶¶ 350-356. Barclays and MLBUSA allegedly "caused the breach of the portfolio selection obligations set forth in the Collateral Management Agreement pertinent to each of [these] CDOs" by controlling portfolio selection and using that control to "engage in adverse selection of the collateral portfolios." *Id.*, ¶¶ 352, 355-356.

Here, the collateral selection process took place prior to Aozora's investments, and Aozora's tortious interference claim seeks damages for "wrongful conduct" that allegedly "deprived Plaintiff of the consideration it bargained for in entering into the these transactions." Complaint ¶ 357. All of this conduct occurred prior to Aozora's investment in the Barclays CDOs, the latest of which took place in February 2007, more than three years before this action was commenced.

Aozora argues that it was not injured until the CDOs were liquidated. As noted, however, Aozora was injured the moment it purchased the CDOs and, with them, the underlying toxic assets. Complaint, ¶ 357. In any event, Aozora was injured by the ratings downgrades by Moody's, and, as discussed above, Citius II and LH II were liquidated in January and August 2009, all of which occurred more than three years before this action was commenced. Gerber affirmation, exhibits 38 and 39. Therefore, Aozora's argument is unpersuasive, and Aozora's fourth cause of action is time-barred under New York law.

D. Negligent Misrepresentation (fifth cause of action)

The statute of limitations for negligent misrepresentation is six years when based upon fraudulent conduct. CPLR 213(1) and (8); *Bokara Rug Co., Inc. v. Kapoor*, 93 A.D.3d 583, 584

(1st Dep't 2012). "A cause of action based on negligent misrepresentation accrues on the date of the alleged misrepresentation which is relied upon by the plaintiff." *Fandy Corp. v. Lung-Fong Chen*, 262 A.D.2d 352, 353 (2d Dep't 1999).

This cause of action is asserted against 250 Capital and Deerfield only. It alleges that 250 Capital and Deerfield "incorrectly represented that they were independent third-party collateral managers, and would perform their collateral management duties independent of Barclays' interests and in the interests of the Plaintiff and other investors." Complaint, ¶ 360. These defendants allegedly "made materially inaccurate representations concerning how, and on what bases, they would evaluate and select collateral." *Id.* The complaint fails to allege any misrepresentations that took place after Aozora invested in the Barclays CDOs. Thus, the negligent misrepresentation claim accrued, at the latest, in February 2007, more than six years before this action was commenced.

The parties dispute whether the two-year discovery accrual rule applies to Aozora's fraud-based negligent misrepresentation claim.[2] The two-year discovery accrual rule applies to negligenct misrepresentation claims where, as here, the claim is based upon allegations of fraud. CPLR 213(8); *14 Bruckner LLC v. 14 Bruckner Blvd. Realty Corp.*, 78 A.D.3d 431, 432 (1st Dep't 2010) (applying discovery accrual rule where negligenct misrepresentation was based upon fraud). For the same reasons discussed above in connection with the fraud claim, Aozora was on inquiry notice more than two years before it commenced this action. Accordingly, the negligent

---

[2] In opposition to Deerfield's motion to dismiss, Aozora argued that the two-year discovery accrual rule should be applied to its negligent misrepresentation claim. Although Deerfield's motion is moot as a result of the discontinuance, 250 Capital incorporates Deerfield's arguments into its opening brief, thereby warranting a brief explanation here.

misrepresentation claim is time-barred under New York law.

E. Unjust Enrichment (sixth cause of action)

The unjust enrichment claim is governed by a six-year statute of limitations pursuant to CPLR 213(1). *Maya NY, LLC v. Hagler*, 106 A.D.3d 583, 585 (1st Dep't 2013) (applying six-year statute of limitations to unjust enrichment); *Coombs v. Jervier*, 74 A.D.3d 724, 724 (2d Dep't 2010) (same); *but see Ingrami v. Rovner*, 45 A.D.3d 806, 808 (2d Dep't 2007) (applying three-year statute of limitations where unjust enrichment claim seeks monetary, as opposed to equitable, relief).

Aozora's unjust enrichment claim is based upon allegations that Barclays "used the Barclays CDOs as vehicles . . . to hedge and profit from hundreds of millions of dollars of its own exposures; and further paying itself CDO structuring and placement fees upon the Barclays CDOs' completion." Complaint, ¶ 369. 250 Capital and Deerfield were allegedly enriched by earning fees as collateral managers, and Merrill Lynch was allegedly enriched through using LH II as part of its arbitrage strategy and from fees it earned for serving as LH II's "Initial Liquidity Bank." *Id.*, ¶¶ 370-372. This conduct allegedly occurred prior to the securitizations, and could not have occurred after Aozora made its investments, which was more than six years before this action was commenced. Therefore, the unjust enrichment claim is time-barred under New York law. The unjust enrichment claim is also subject to dismissal for the independent reason that it is duplicative of Aozora's fraud claim. *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 (2012) ("unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim").

* * *

For the foregoing reasons, defendants have established, prima facie, that the complaint is time-barred under New York law, and Aozora fails to raise any factual issues concerning the inapplicability or tolling of the statute of limitations. *Baptiste*, 88 A.D.3d at 753. Because the action must be timely in both New York and Japan , CPLR 202; *Oxbow Calcining USA Inc.*, 96 A.D.3d at 651, having determined that Aozora's claims are time-barred under New York law, the Court need not address the statute of limitations under Japanese law. Accordingly, defendants' motions to dismiss the complaint as time-barred are granted. Because the action is dismissed as time-barred, the court does not address defendants' alternative grounds for dismissal.

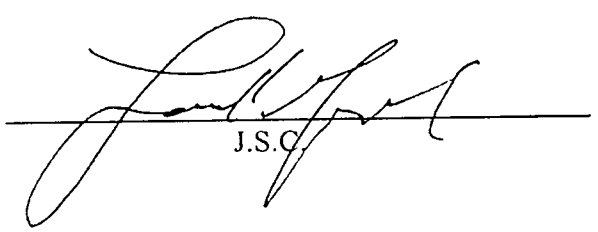
Accordingly, it is hereby

ORDERED that the motions to dismiss this action (motion sequence numbers 001, 002 and 003) are granted and the complaint is dismissed.

This constitutes the Decision and Order of the Court.

Dated: June 24, 2015

ENTER:



HON. LAWRENCE K. MARKS